Supreme Court, U.S.
FILED

162

No. 091423

MAY 24 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

HORST SCHWINN, Guardian of Doerte Hesse
and
MARCUS HESSEE, Guardian of Josef Hesse,

Petitioners,

v.

CHARLES STEPHEN EBBETS
and
LONG AND FOSTER REAL ESTATE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven M. Garver
Counsel of Record
GARVER LAW OFFICES, P.C.
11702 Bowman Green Drive
Post Office Box 2430
Reston, Virginia 20190
(703) 471-1090
steve@garverlaw.com

Douglas K. Landau
ABRAMS LANDAU, LTD.
797 Center Street
Herndon, Virginia 20170
(703) 796-9555
attorney@landaulawshop.com

Counsel for Petitioners

Dated: May 24, 2010

THE LEX GROUP DC ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

1. Where basic material facts are largely not in dispute, but the inferences which could reasonably be drawn from the facts are in dispute, is a grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a denial of the right to a jury trial pursuant to Amendment VII of the United States Constitution?

2. Where basic material facts are largely not in dispute, but the inferences which reasonably could be drawn from them and the conclusions to be reached from those facts and inferences are in dispute, is summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proper?

3. Where Virginia law provides that the test to determine whether a company is an employer for purposes of vicarious liability by respondeat superior is fact specific and generally a jury question involving a four part test with the most significant factor the right to control, is the grant of summary judgment where there is a genuine dispute as to the conclusions from the evidence with regard to the right to control a denial of the right to a jury determination of the issue pursuant to the 7th Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Horst Schwin is a German citizen, living in Germany, who is the *Guardian ad Litem* for Doerte Hesse, a German citizen living in Germany, who is his daughter and the wife of Josef Hesse. Marcus Hesse is a German citizen, living in Germany, who is *Guardian ad Litem* for Josef Hesse, who is Marcus' father.

Respondent

Respondent Long & Foster Real Estate, Incorporated is a corporation doing business in several jurisdictions, but as is relevant here, in Virginia. Charles Stephen Ebbets is an individual and real estate salesperson for Long & Foster Real Estate, Incorporated, who at all times relevant hereto was acting on the business of Long & Foster Real Estate, Incorporated.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

BRIEF INTRODUCTORY STATEMENT 1

OPINIONS AND ORDERS BELOW 2

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL, STATUTORY, PROVISIONS AND RULES INVOLVED 3

STATEMENT OF THE CASE 5

LAW AND ARGUMENT
STANDARD OF REVEW BELOW 7

ARGUMENT 8

THOUGH BASIC FACTS MAY BE THE SAME, WHEN THE INFERENCES AND CONCLUSIONS DRAWN ARE IN DISPUTE THERE IS A JURY QUESTION 8

Granting Summary Judgment Denied Appellant's the Right to a Jury Trial Where the Basic Facts Could Create in the Minds of Reasonable Jurors Different Inferences and They Could Reasonably Reach Different Conclusions from the Same Basic Facts 8

VIRGINIA LAW ON VICARIOUS LIABILITY AND EMPLOYMENT IN THE CONTEXT OF A TORT ACTION 11

"FACTS" SUPPORTING VICARIOUS LIABILITY 12

CONCLUSION 34

APPENDIX:

Unpublished Opinion of
The United States Court of Appeals
for the Fourth Circuit
entered January 25, 2010 ..... 1a

Judgment of
The United States Court of Appeals
for the Fourth Circuit
entered January 25, 2010 ..... 8a

Order of
The United States District Court
for the Eastern District of Virginia
entered May 1, 2008 ..... 11a

Judgment of
The United States District Court
for the Eastern District of Virginia
entered May 1, 2008 ..... 13a

Memorandum Opinion of
The United States District Court
for the Eastern District of Virginia
entered December 20, 2007 ..... 15a

Order of
The United States Court of Appeals
for The Fourth Circuit
Re: Denying Petition for Rehearing
entered February 22, 2010 ..... 34a

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 91 L. Ed. 2d 202,
106 S. Ct. 2505 (1986) 7

Barber, Admr. v. Textile Machine Works,
178 Va. 435, 17 S.E.2d 359 (1941) 30, 32

Barr v. Town & Country Properties, Inc.,
240 Va. 292 (Va. 1990) 17, 18

Celotex Corp. v. Catrett,
477 U.S. 317, 91 L. Ed. 2d 265,
106 S. Ct. 2548 (1986) 7

Chandler v. Kelly,
149 Va. 221 (1928) 16

Clinchfield Coal v. Redd,
123 Va. 420, 96 S.E. 836 (1918) 14, 15, 28

Griffith v. Electrolux Corp.,
176 Va. 378, 11 S.E.2d 644 (1940) 30, 32

Higgins v. E.I. DuPont de Nemours & Co.,
863 F.2d 1162 (4th Cir. 1988) 7

Hooper v. Sachs,
618 F. Supp. 963 (1985 D.C. Md.) 10

McDonald v. Hampton Training School,
254 Va. 79 (1997) ..... *passim*

Morvillo v. Shenandoah Mem. Hosp.,
2008 U.S. Dist. Ct. LEXIS 68595
(W.D. Va. Sept. 10, 2008) 16, 27

Murphy v. Holiday Inns, Inc.,
216 Va. 490 (1975) 16

Nunez v. Superior Oil Co.,
572 F.2d 1119 (5th Cir. 1978) 10

Phillips Oil Co. v. OKC Corp.,
812 F.2d 265 (5th Cir. 1985) 10

Saunders v. General Services Corp.,
659 F. Supp. 1042 (D. Va. 1987) 15

SEC v. Murphy,
626 F.2d 633 (1980) 10

Sinclair Refining Co. v.
Unemployment Compensation Commission,
189 Va. 692 (1949) 31, 33

Spainhour v. B. Aubrey Huffman & Assoc.,
237 Va. 340, 377 S.E.2d 615 (1989) 14

State Farm Mutual Auto Ins. v. Floyd,
235 Va. 136, 366 S.E.2d 93 (1988) 14

Steffan v. Freemason Assocs.,
60 Va. Cir. 216 (Va. Cir. Ct. 2002) ..... *passim*

Taylor v. International Union of Journeymen Horseshoers, 353 F.2d 593 (4th Cir. 1965) 24

Texas Company v. Zeigler, 177 Va. 557, 14 S.E.2d 704 (1941) 23, 24, 28, 31

Unemployment Compensation Commission of Virginia v. Harvey, 179 Va. 202, 18 S.E.2d 390 (1942) 28

Va. Real Estate Comm. v. Bias, 226 Va. 264, 308 S.E.2d 123 (1983) 14

Virginia Employment Commission v. A.I.M. Corp., 225 Va. 338, 302 S.E.2d 534 (1983) 31, 33

Walker v. Crigler, 976 F.2d 900 (4th Cir. 1992) 14, 15

Wilbanks v. Watson, 13 Cir. LE12833, 53 Va. Cir. 267 (2000) 14

CONSTITUTIONAL PROVISION

U.S. CONST. AMEND. VII 3, 8, 9

STATUTES

28 U.S.C. § 1254 3

28 U.S.C. § 1291 2

28 U.S.C. § 1332 2

18 VAC § 135-20-155 13

18 VAC § 135-20-160(D) 12, 13, 27

Va. Code § 54.1-404 14

Va. Code § 54.1-2100 12

Va. Code § 54.1-2101 12

Va. Code § 54.1-2106.1(B) 12

Va. Code § 65.1-4.3 18

RULE

Fed. R. Civ. P. 56 ..... *passim*

BRIEF INTRODUCTORY STATEMENT

This case arises out of two separate cases heard together brought by the guardians for two persons severely injured in an automobile/motorcycle collision in Fauquier County, Virginia. Josef Hesse and Doerte Hesse, husband and wife, were involved in a collision when an automobile operated by Charles Stephen Ebbets pulled out in front of them from a stop sign. A suit was filed in the Eastern District of Virginia by the guardians for the respective plaintiffs who are German citizens and were on holiday in Virginia when the devastating injuries occurred. A jury trial was requested by the Plaintiffs. Mr. Ebbets was returning to his office from a property listed with Long and Foster and on Long and Foster business when the collision occurred. He was at all times relevant, a salesperson whose license to sell real estate was issued (by Virginia licensing authorities) to Long and Foster Real Estate, Incorporated and pursuant to supervision by Long and Foster as provided by law and contract. A motion for summary judgment was granted before trial in favor of Long and Foster Real Estate, Incorporated, finding that Ebbets was not its employee, but an independent contractor for tort purposes under Virginia law. A judgment was rendered on behalf of the Plaintiffs collectively in the amount of 36 million dollars against Ebbets. An appeal was taken by the Plaintiffs on the issue of the summary judgment in favor of Long and Foster.

OPINIONS AND ORDERS BELOW

The U.S. District Court for the Eastern District of Virginia entered a memorandum opinion on December 20, 2007, which found that Long and Foster Real Estate, Inc. was entitled to summary judgment on the issue of vicarious liability. (Appendix 15a hereto). The said Court entered final judgment and an order on May 1, 2008, which dismissed the cause as to Long and Foster Real Estate, Inc. based upon the memorandum opinion recited above. (See Appendix 13a and 11a hereto.)

The 4th Circuit Court of Appeals rendered an opinion dated January 25, 2010 and a judgment of the same date which affirmed the ruling of the trial court denying the Plaintiffs a jury trial on the issue of vicarious liability and the control which Long and foster had a right to exercise over Defendant Ebbets. (See App. 8a and 1a hereto.)

The 4th Circuit entered a final order of February 22, 2010, which denied a rehearing and denied en banc hearing. (App. 34a hereto.)

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332 since the parties were of diverse citizenship (the Plaintiffs being citizens and residents of Germany). The 4th Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291. On May 21 and May 29, 2008, the Hesses timely noted their appeals to the 4th Circuit Court of Appeals. The Fourth Circuit issued its

opinion and entered final judgment denying the motion for reconsideration and an *en banc* hearing on or about February 22, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. This Petition for a Writ of Certiorari is timely filed.

CONSTITUTIONAL, STATUTORY, PROVISIONS AND RULES INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56 Provides:

> **(b) By a Defending Party.**
> A party against whom relief is sought may move, with or without supporting affidavits, for summary judgment
> **(c) Time for a Motion, Response, and Reply; Proceedings.**
> (1) These times apply unless a different time is set by local rule or the court orders otherwise:
> (A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and
(C) the movant may file a reply within 14 days after the response is served.
(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
(d) Case Not Fully Adjudicated on the Motion.
(1) Establishing Facts.
If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts — including items of damages or other relief — are not genuinely at issue. The facts so specified must be treated as established in the action.
(2) Establishing Liability.
An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.
(e) Affidavits; Further Testimony.
(1) In General.
A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and

show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond.

When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT OF THE CASE

Josef and Doerte Hesse, husband and wife (the "Hesses"), are German citizens and residents and suffered devastating injuries while visiting the United States. They were near Warrenton, Virginia when a Long & Foster Real Estate, Inc. (L&F) salesperson, Charles Stephen Ebbets, pulled his car out from behind a stop sign into the path of an oncoming motorcycle on which the Hesses were riding (the Hesses having the right of way). The serious brain injuries and other injuries sustained by the Hesses were catastrophic and they recovered

judgments totaling $36 million in damages against Ebbets.

Because of a summary judgment ruling made by the District Court before trial, L&F, the company whose business the L&F salesperson was performing at the time of the collision, escaped all liability for the $36 million in damages the Hesse's suffered from their massive injuries. The District Court entered summary judgment dismissing all claims against L&F and allowed the Hesse's to proceed to trial only against the L&F salesperson. The principal question was whether L&F was liable on the theory of vicarious liability applying Virginia law which uses a four part test to determine whether one is an employee for tort purposes emphasizing the issue of right to control.

The District Court concluded that the L&F salesperson was an independent contractor and that L&F had no vicarious liability for the L&F salesperson. The trial Court found that Plaintiffs arguments that the evidence was overwhelmingly in favor of the contrary conclusion was misplaced and drew the wrong inferences/conclusions from the basic facts. As a result, the trial went forward only against the L&F salesperson, Ebbets. Final judgments totaling $36 million were entered against Ebbets on May 1, 2008, and the Hesse's timely noted their appeals to the 4th Circuit Court of Appeals on the issue of granting summary judgment to L&F. The 4th Circuit sustained the findings of the trial court.

LAW AND ARGUMENT
STANDARD OF REVIEW BELOW

The proper standard of review in the Fourth Circuit was to review the district court's grant of summary judgment *de novo*. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Thus, the Fourth Circuit should have viewed the evidence in the light most favorable to the nonmoving party, the plaintiffs, the Petitioners herein. All inferences from the basic facts should be taken favorably to the Petitioners, the non-moving party on the granted summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

ARGUMENT

THOUGH BASIC FACTS MAY BE THE SAME, WHEN THE INFERENCES AND CONCLUSIONS DRAWN ARE IN DISPUTE THERE IS A JURY QUESTION.

Granting Summary Judgment Denied Appellant's the Right to a Jury Trial Where the Basic Facts Could Create in the Minds of Reasonable Jurors Different Inferences and They Could Reasonably Reach Different Conclusions from the Same Basic Facts.

Where basic material facts are largely not in dispute, but the inferences which could reasonably be drawn from the facts are in dispute, a grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is a denial of the right to a jury trial pursuant to Amendment VII of the United States Constitution. Where basic material facts are largely not in dispute, but the inferences which reasonably could be drawn from them and the conclusions to be reached from those facts and inferences are in dispute, summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is not proper and denies a litigant the constitutional right to a jury determination of the issue(s). Where Virginia law provides that the test to determine whether a company is an employer for purposes of vicarious liability by respondeat superior is fact specific and generally a jury question involving a four part test with the most significant factor being the right to control, the grant of

summary judgment where there is a genuine dispute as to the conclusions from the evidence with regard to the right to control is a denial of the right to a jury determination of the issue pursuant to the 7th Amendment to the United States Constitution.

The U.S. Constitution, Amendment VII, guarantees the right to a jury trial in civil cases in which the sum in controversy exceeds twenty dollars. While many federal courts have advanced the idea that Rule 56 of the Federal Rules of Civil Procedure is a procedure which ought to be encouraged to root out cases without any merit and frivolous claims they have also warned of its dangers and possible abuse. The granting of summary judgment effectively denies a party litigant a trial on the merits and particularly when a jury trial is requested, the Court should be hesitant to grant summary judgment. While the Petitioner recognizes that there is merit to resolving cases early and that it is convenient for courts to summarily review matters it is not for a judge to shortcut procedures and deny a party of his constitutional right to a jury determination of the issue. We live in a world where there is much gray and though it is easy to call white or black, gray is an area which is subjective, an area which should be left to a jury to determine. Though it may be easy and convenient for a trial judge to substitute his or her interpretation of basic facts or to reach inferences and conclusions it is not for a trial judge to take the place of the jury. It may be convenient and it may be that most of the time the trial judge may reach the same conclusion that a jury may reach, but it is the right of a litigant to have a jury of peers to decide the facts, to look to the

inferences and reach conclusions from those inferences. The courts ought to be most vigilant against abuse or denial of a right to a jury trial where the case arises by a common law cause of action, particularly when exercising diversity jurisdiction and applying state law.

When facts are not in dispute but there is a dispute as to the inferences and conclusions to draw therefrom and the findings summary judgment is not appropriate and denies the party against whom it is found a right to a jury trial of the facts. Where conflicting inferences can be drawn then the issue should be submitted to a jury. *Hooper v. Sachs*, 618 F. Supp. 963 (1985 D.C. Md.). Where a jury is requested and the parties disagree on the permissible inferences which can be drawn from the basic facts it is improper to grant summary judgment and deny one of the rights to a jury trial. *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir. 1985), *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978). Where testimony is required about facts giving rise to inferences and conclusions which may be drawn it is not appropriate to grant summary judgment. *SEC v. Murphy*, 626 F.2d 633 (1980). This Court should grant the writ sought to define and set forth guidelines to protect the rights of litigants to their right to a jury trial. Our judicial system is not just about convenience. Convenience would deny cross examination. Convenience would permit summary trials and proffers or even turn our courts to an inquisitory system, but that is not the system our forefathers created, nor is it the system our constitution provides. We have a system which attempts to be fair to all litigants, to protect the

weak so that they may have as even a playing field as is possible, to let them have differences in credibility, intent, and subjective conclusions such as control determined by a jury.

VIRGINIA LAW ON VICARIOUS LIABILITY AND EMPLOYMENT IN THE CONTEXT OF A TORT ACTION.

Virginia recognizes that vicarious liability by respondeat superior in tort cases is determined by what is known as the *McDonald* test. *McDonald v. Hampton Training School*, 254 Va. 79, 81 (1997). The McDonald test sets forth four factors:

McDonald, 254 Va. at 81.

> The factors which are to be considered when determining whether an individual employee or an independent contractor are well established (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. **The fourth factor, the power to control is determinative. . . . This factor refers to control over the means and method of performing the work. It is immaterial whether the employer exercises this control; the test is whether the employer has the power to exercise such control.**

While the Petitioner recognizes that the trial judges analysis in this case may be a possible view a fact finder may take, there are other conclusions and inferences which a reasonable jury could take from the same basic facts.

"FACTS" SUPPORTING VICARIOUS LIABILITY

Without reviewing every fact presented, the following reviews some of the evidence in a light which creates inferences in favor of the Plaintiffs, petitioners herein, contrary to the conclusions reached by the trial judge...and in favor of vicarious liability applying Virginia's test.

In the case of a real estate broker and agent, the Virginia code and regulations support a finding, that Long and Foster, has not only the right, but the duty, to control the agent. The real estate industry is regulated by the Commonwealth of Virginia. See e.g. Va. Code. § 54.1-2100 (defining a broker) and § 54.1-2101 (defining a salesperson). Based on the statutory scheme, a person cannot be a broker unless they are licensed by the Real Estate Board. Va. Code § 54.1-2106.1(B). A salesperson cannot sell real estate absent a broker. Va. Code § 54.1-2101 and 18 VAC § 135-20-160(D). The regulations promulgated by the Virginia Real Estate Board dictate that every place of real estate business or branch office "shall be supervised by a supervising broker" who shall "exercise reasonable and adequate supervision of the provision for real estate brokerage services by associate brokers and salesperson assigned to the office." 18 VAC § 135-20-160(D).

The regulations further define the required control. The required supervision includes (and indeed also regulated in the contract between Ebbets and Long and Foster), but is not limited to, providing clear guidance on the proper handling of escrow accounts; complying with fair housing laws, negotiating and drafting contracts; property disclosure; and such other matters as necessary to assure the competence of salespersons and other licensees. 18 VAC § 135-20-155 *et. seq.* In fact, a real estate agent/salesperson cannot work in the Commonwealth of Virginia without the supervision and control of a supervising broker. 18 VAC § 135-20-160(D). The license for a real estate sales person is sent to the broker and if the broker is discharged or leaves to go to another broker, his/her license must be returned to the Commonwealth and then can be re-issued to the new broker for that sales person. The sales person cannot work until the license is re-issued to the new broker.

Based on this regulatory scheme, a real estate broker has a non-delegable duty to control his/her salespersons. This duty cannot be abrogated by a contract between the broker and the salesperson. It has long been held in Virginia that

> Selection of the servant, payment of wages, power of dismissal and particularly the power of control, are circumstances to be considered, and are usually decisive, in determining the relation of master and servant; **but where the work to be done involves the exercise of personal and non-**

> **assignable legal duties, no individual or corporation can escape the doctrine of respondeat superior** by transferring to third person the selection and payment and the power of dismissal and control of the servant.

Clinchfield Coal v. Redd, 123 Va. 420, 434, 96 S.E. 836 (1918) (emphasis added); *see also Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992) (holding the property owner liable for the discriminatory actions of his leasing agent, because "the duty of a property owner not to discriminate in the leasing or sale of that property is non-delegable."); *Spainhour v. B. Aubrey Huffman & Assoc.*, 237 Va. 340, 346, 377 S.E.2d 615 (1989)(holding that a statutory rule of law fixes "binding standards which are not left to the exercise of professional judgment. Being rules of law, they are not subject to expert opinions expounding local practices."); *Va. Real Estate Comm. v. Bias*, 226 Va. 264, 269-70, 308 S.E.2d 123, 126 (1983) (broker has absolute duty to convey offer promptly to seller); *State Farm Mutual Auto Ins. v. Floyd*, 235 Va. 136, 144, 366 S.E.2d 93, 97 (1988) (attorney has legal duty to convey settlement offer to client); *see also Wilbanks v. Watson*, 13 Cir. LE12833, 53 Va. Cir. 267 (2000) (The portions of the regulations, which were promulgated by the Board of Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects pursuant to Va. Code Ann. § 54.1-404 (Michie 1998), dictated the standard of care).

In *Clinchfield Coal*, an employer used an officer who was paid by a third-party detective agency to keep order around a coal mining camp. The officer apprehended the plaintiff,[1] and ultimately the warrant was dismissed. The Court concluded that when an owner of an enterprise undertakes to police its own property, "his duties are personal and non-assignable, and where he arranges for and accepts the service he will not be permitted to say the relationship does not exist." *Clinchfield Coal*, 123 Va. at 434.

Further, in *Walker*, there was sufficient evidence that the owner of an apartment had specifically intended that his property manager to apply noniscriminatory policies when renting out his properties. The property manager, however, refused to rent an apartment to the plaintiff solely because she was a woman. The trial court found that the property manager acted outside the scope of her employment, and, therefore, the property owner was not liable. The Fourth Circuit reversed and found the property owner liable on the basis that, "the duty of a property owner not to discriminate in the leasing or sale of that property is **non delegable**." *Walker*, 976 F.2d at 904; *see also Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1059 (D. Va. 1987) ("Courts have followed this rule even where "it seems harsh to punish innocent and well-

---

[1] It is not clear what authority this officer had to apprehend an individual. Although apparently, at the time the incident took place, it was a common and well-known practice for mining, manufacturing, and transportation companies to employ special agents who were clothed with police powers. *Clinchfield Coal*, 123 Va. at 431-432.

intentioned employers" because the statutory duty not to discriminate is non-delegable"; *see also Steffan v. Freemason Assocs.*, 60 Va. Cir. 216, 218 (Va. Cir. Ct. 2002) ("When an agreement, considered as a whole, established an agency relationship, the parties cannot effectively disclaim it by formal "consent." "[The] relationship of the parties does not depend upon what the parties themselves call it, but rather in law what it actually is." (quoting *Murphy v. Holiday Inns, Inc.*, 216 Va. 490, 492 (1975); *Chandler v. Kelly*, 149 Va. 221, 231 (1928)).

Similarly, in the case of real estate brokers, the statutory and regulatory scheme unequivocally assigns a non-delegable duty to supervise the salespersons to the broker. There is no statutory or regulatory permission to delegate these duties to another party, including to the salesperson. The label of "independent contractor" is irrelevant, and it is immaterial that Long & Foster may have chosen not to supervise Ebbets. The question is whether Long & Foster had a non-delegable duty to supervise Ebbets. The regulatory scheme explicitly answers that question: Long & Foster had a *per se* duty to control Ebbets. Therefore a reasonable juror may conclude that Long & Foster had the right to control Ebbets. Although it may not be dispositive of the issue of control and vicarious liability, in and of itself, it is certainly a factor to be considered by the jury (fact finder). *See Morvillo v. Shenandoah Mem. Hosp.*, 2008 U.S. Dist. Ct. LEXIS 68595 (W.D. Va.). In the instant case, the specific evidence reinforces this conclusion. Ebbets and all of the Long & Foster witnesses, testified that Ebbets cannot sell real estate without his license being recorded with a

broker, such as Long & Foster. If the relationship between Ebbets and Long & Foster were to terminate, then Long & Foster would return Ebbets license to the Commonwealth. All of the listings, client contacts, and work-product belong to Long & Foster. Thus, Ebbets, has no independent means of working as a real estate salesperson. He cannot bring a contract to another broker or sell for another broker (except in the context of Long and Foster sharing with another broker).

This evidence supports a finding that Ebbets was an employee of Long & Foster, rather than an independent contractor. Although there are no Virginia Supreme Court cases directly on point, Virginia cases have consistently held that real estate salespersons are employees rather than independent contractors. For instance, in *Barr v. Town & Country Properties, Inc.*, 240 Va. 292, 295-296 (Va. 1990), the Virginia Supreme Court held that a real estate agent was an employee for purposes of the Workers' Compensation Act because her contract did not contain a provision that she will not be treated as an employee for federal income tax purposes. This case, however, turned on an interpretation of the Workers Compensation statute. *Barr*, 240 Va. 292, 295-296. The test for whether a person is an employee under the Workers Compensation Act is distinct from that found in *McDonald*. The Court in *Barr* declined the salesperson's invitation to construe the phrase in her contract that she "shall otherwise be deemed to be an independent contractor and not a servant, employee or partner of Broker" in such a manner as to satisfy the specific and unambiguous language contained in the

Workers Compensation Statute, Va. Code § 65.1-4.3. *Barr*, 240 Va. at 295-296.

The Norfolk County Circuit Court reviewed the question of whether a broker would be held liable for the actions of its salespersons in *Steffan*, 60 Va. Cir. 216 (Norfolk 2002).[2] In *Steffan*, the Court thoroughly reviewed the contract and addendum between the broker and the salesperson, the Standard Listing Agreements, and the broker's Policies and Procedure Manual to determine whether or not the broker had the power to control the salesperson. The Court concluded based on the language of these documents, that despite the fact that the label given to the salesperson, the salesperson was the broker's employee.

Similar to the facts in *Steffan*, the Contract between Long & Foster and Ebbets, the Long & Foster Policy Manual, and the actual operation of the Long & Foster office support a holding that Long & Foster had the power to control Ebbets. Ebbets had a written contract with Long and Foster which provided the right of Long and Foster to control Ebbets and the requirement that he adhere to the Policy Manual (unless specifically contradicted by the contract). The policy manual is a manual with specific directions as to how the salespersons must carry out the business of Long and Foster, in excess of 100 page (it is available to the Court if the Court desires it to be produced). The manual details obligations and the control of or right to control Ebbets. And it provides that Long and Foster may

---

[2] This decision was not appealed.

in its sole discretion unilaterally change or modify the manual at any time and that Ebbets must abide by the changes with his only remedy to leave (which included him leaving "his' Long and Foster listings and contracts and parts of any commissions for contracts which would be pending. (It may be that Long and Foster chose not to exercise much control because Ebbets was an extremely successful sales agent bringing a great deal of business to Long and Foster, but it is not the actual control, but the right to control.))

The contract between the broker and agent required the agent to work diligently in the sale and lease of all real estate listed with the broker that are made available to agent (not just the agent's listings) and to solicit additional listings and clients "in the name of Broker. See Contract ¶ 4; Ebbets Deposition p. 242 lines 11-15; *Steffan*, 60 Va. Cir. at 219. Ebbets' contract and the Policy Manual require that all suits for commission be brought in the name of Long & Foster. See Contract ¶ 12; Policy Manual pp. 4; Ebbets Deposition pp. 210-215; Brouwer deposition pp. 86-88; *Steffan*, 60 Va. Cir. at 219. Ebbets' contract and Policy Manual contain provisions stating that Long & Foster was to resolve all disputes between salespersons. Furthermore, the Policy Manual required that a sales associate could not file a grievance or complaint against any other real estate salesperson without prior approval of a Long & Foster Branch Manager, Vice-President or General Regional Manager. See Contract ¶ 21(b); Policy Manual p. 15; Nash Deposition p. 118 line 13 - p. 119 line 14; *Steffan*, 60 Va. Cir. at 219. In addition, Long & Foster controlled the manner in

which Ebbets performed his job. Ebbets could work from his home, but could not establish an additional office, without broker approval. Ebbets Deposition p. 243; Nash Deposition p. 124 line 2-20; *Steffan*, 60 Va. Cir. at 219. All monies from real estate transactions went to Long and Foster, who then paid Ebbets a commission after deducting any expenses he owed such as advertising fees, insurance, or other expenses. Ebbets Deposition pp. 109-110; Nash Deposition p. 87 line 15-21. Any monies that were to be placed in escrow by a client of Long & Foster, even though serviced by Ebbets, (and even though perceived to be a client of Ebbets) went into Long and Foster's escrow account. See Contract ¶ 7, Policy Manual pp. 14; Ebbets pp. 117; Nash Deposition p. 76 line 12 - p. 77 line 9; *Steffan*, 60 Va. Cir. at 219. A managing broker in the Long & Foster office was required to review and approve every listing agreement and every contract Ebbets procured (and every listing agreement was with Long and Foster as a party, never Ebbets). Ebbets Deposition p. 63, 73; Nash Deposition p. 13 line 17-18; p. 20; Brouwer Deposition p. 23 line 3-11, p. 27 line 19-21; *Steffan*, 60 Va. Cir. at 219. All of the Long & Foster salespersons were required to purchase Errors and Omissions insurance from a specific company (costs were deducted from the salesperson's commissions). Policy Manual p. 8; Nash Deposition p. 78-79; *Steffan*, 60 Va. Cir. at 220. And Ebbets was required to carry a minimum amount of liability auto insurance while using his vehicle for work purposes. Too, Long and Foster's liability policy provided as named insureds Long and Foster employees, but did not define employees (which under Virginia insurance law in favor of

coverage provides for the broadest construction of the term employee). The Long & Foster Policy Manual dictates that if a salesperson wanted a personal assistant, all personnel functions for that assistant are handled through Long & Foster. Policy Manual p. 62; *Steffan*, 60 Va. Cir. at 220. Ebbets could not accept cash or checks written to him during a settlement or closing on a house, nor could he accept a post-dated check. Nash Deposition p. 23 line 22 - p. 24 line 9; Policy Manual p. 33; *Steffan*, 60 Va. Cir. at 220. The Policy Manual states that salespersons should strongly encourage the purchase of Long & Foster Homeowner Warranty Program to reduce the risk for liability for the salesperson and Long & Foster, Policy Manual p. 19; *Steffan*, 60 Va. Cir. at 220. If the salesperson should get an "Exclusive Right to Sell listing out of his/her service area, it urged that the listing be made a co-Exclusive Right to Sell shared with a Long & Foster associate in the listing's service area. Policy Manual p. 28. A salesperson's business cards, advertising, website had to have the Long & Foster logo present and were subject to approval by Long and Foster. Addendum D to Policy Manual p. 46, 87; See also Brouwer Deposition p. 20-16; Nash Deposition at p. 92 line 7- p. 93 line 19; Policy Manual p. 46; *Steffan*, 60 Va. Cir. at 220. Long & Foster did not allow its salespersons to conduct appraisals (assuming the salesperson had a separate appraiser's license) on their own real estate transactions, and did not allow its salespersons list business opportunities unless the opportunity was connected to real estate, Policy manual pp. 12 and 18. Long & Fosters' Policy Manual also regulated the salespersons regarding

advertising (and all advertising was to be pre-approved), use of the internet, e-mail and telephones, personal dress, and use of alcohol and drugs. Policy Manual p. 10-11, 25, 26, 29 Brouwer Deposition p. 39 line 4 - 40 line 3; Nash Deposition p. 44 line 4 - 45 line 5. Ebbets was subject to termination for failing to use Long & Foster forms for listing agreements, or for using Long & Foster letterhead for personal business. See Policy Manual p. 32.

Long & Foster also owned all of Ebbets' work-product. The listing agreement, the contract were not between Ebbets and the homeowner, but rather between Long & Foster and the homeowner. Policy Manual p. 21. In fact, all office records, files and correspondence are deemed property of Long & Foster. Policy Manual p. 22. Upon a severing of the relationship between Long & Foster and Ebbets, Long & Foster retained all listings, and all contracts. At the request of a seller, Long & Foster might, at its sole discretion release an existing listing contract. Contract ¶ 17, 19, 20(b); Addendum; See also Brouwer Deposition pp. 66 line 14-17.

The listing agreements and contracts reinforce the control that Long & Foster exerts over Ebbets. The Listing Agreements are signed by the managing broker. Although the salesperson is mentioned, it is clearly a contract between Long & Foster and the homeowner. The first line of the agreement stated: "This Agreement is made on _____ by and between (Seller) and Long & Foster, REALTORS (broker)." It is the broker, Long & Foster who is entitled to the exclusive listing, not Ebbets. It is

Long & Foster who is obligated to act as the Seller's agent, the brokerage fee is to be paid to Long & Foster. See Listing Agreement. The agreements also require that the Seller (the client) indemnify Long & Foster. *Steffan*, 60 Va. Cir. 220-221.

And all of the conditions of Mr. Ebbets employment were subject to change. Mr. Ebbets signed acknowledgments that he had read the Policy Manual, and that it was binding. Mr. Ebbets' contract explicitly states that the Policy Manual is subject to change. In fact, Mr. Philips testified that the Policy Manual in effect in 2005 has subsequently been updated and changed. Philips Deposition p. 48. Ebbets signed an acknowledgment that the Policy Manual changed in 2007.

The *Steffan* Court's decision comports with the Supreme Court's holding in *McDonald*. The Virginia Supreme Court found that the exercise of professional judgment, by itself, was no longer an automatic bar to the conclusion that a doctor was an employee. The Court concluded that a jury could find that a doctor was an employee because the Hospital reviewed his performance and instituted rules and regulations binding on the doctor. The Virginia Supreme Court, therefore, remanded the case for a jury determination on the question of vicarious liability. Similarly, in the case of a broker, the determination of whether a salesperson is an employee should be a jury determination.

Furthermore, a real estate salesperson is more akin to "cosignee"/driver of a gasoline distributor in *Texas Company v. Zeigler*, 177 Va.

557, 14 S.E.2d 704 (1941). In *Texas Company*, the cosignee/driver was at fault in a motor vehicle collision. The distributor argued that the cosignee/driver was an independent contractor. The Court disagreed, noting that the contract between the distributor and the cosignee/driver put the driver under a complete system of restraint and power in that the driver was not allowed to do business in his own name, unassociated with that of the company, the paperwork was all on the company's letterhead, and that the driver could not assign his contract with the distributor.[3]

Similarly, in the instant case, all of Ebbets correspondence required Long & Foster letterhead, and/or the presence of the Long & Foster logo. He was required to use Long & Foster listing, sales and contractual forms when he was conducting business. All of these forms had the Long & Foster logo affixed to the top of the form. Ebbets was also clearly not allowed to conduct business in his own name. He could not even function as a real estate salesperson without being licensed through, or having it placed with, a broker, such as Long & Foster. He could not accept money, or checks, in his own name. All

---

[3] Internal Revenue Code and regulations also establish a test to determine whether or not a person is an independent contractor or an employee. This test looks at the degree of control of the purported employer and the degree of independence that the worker has. The IRC looks at the level of behavioral control, financial control, the type of the relationship (i.e. permanency of relationship, what benefits the employer gives to the individual, and the extent the services performed are a key aspect of the business). *See e.g. Taylor v. International Union of Journeymen Horseshoers*, 353 F.2d 593 (4th Cir. 1965).

checks were to be written to Long & Foster. Ebbets could not open his own escrow accounts for clients. All listings and contracts needed to be approved by a managing broker at Long & Foster.

The contract alone provided the following elements which may be deemed evidence of control for purposes of finding that Ebbets was an employee for purposes of tort liability and a determination of vicarious liability:

1. Suit for commissions in name of broker;
2. All contracts in name of broker;
3. Associate to fully cooperate with broker for any suit;
4. Associate to have 250/500 Liability insurance and indemnify Broker;
5. Associate bound by Policy Manual except when in direct conflict with contract (But contract amended by document for continuing employment);
6. All listings and contracts in name of Broker;
7. All materials, sales materials, contracts listings, advertising, lists of prospects and clients are property of Broker;
8. Broker to approve all forms and contracts and all other terms of listing agreements;

9. Broker to approve all correspondence relating to transactions;
10. All facilities used are for exclusive benefit of Broker's business;
11. Associate may not use knowledge acquired from business for benefit in any other employment or for benefit of self or any other party (real estate company) and agrees that Broker entitled to an injunction;
12. Agreement is a personal agreement and may not be assigned; and
13. Commissions to be charged shall be determined by the Broker.

Further, in the addendum to the agreement there is a ... "POLICY MANUAL ACKNOWLEDGMENT" signed by Ebbets, which provides:

> "I AGREE TO ADHERE TO THE POLICIES OUTLINED IN THIS MANUAL AS PART OF MY CONTINUED ASSOCIATION WITH LONG AND FOSTER".

There is a dearth of case law addressing this prong of the employee/independent contractor test. The statutory and regulatory scheme, however, seems to support a finding that Ebbets was an employee of Long and Foster. By regulation, a real

estate salesperson may only act under the supervision and control of a supervising broker. 18 VAC § 135-20-160(D). Mr Ebbets cannot work absent engagement by Long & Foster, or some other broker. The broker, therefore, has the right to select and engage its agents, and can choose to reject any agent that it feels is not appropriate to work for Long & Foster. Similarly in *Morvillo v. Shenandoah Mem. Hosp.*, 2008 U.S. Dist. LEXIS 68595, the district court held that the statutory scheme/regulatory scheme which required a CRNA to be supervised by a physician was a factor to be considered by a jury in determining whether there was sufficient control to deem the CRNA an employee of the physician.

Both managing brokers in the Long & Foster office during 2005 testified that they had the power to select salespersons. Mr. Brouwer testified that one of the managing brokers in the office would interview potential salespersons and determine if that person was a good candidate for real estate sales in the Long & Foster office. Brouwer Deposition p. 24 line 4 - 25 line 20. Mr. Nash testified what he would look for in a new salesperson, and described the different interview for someone new to the business as opposed to one coming from another broker. Nash Deposition p. 36 line 9 - 37 line 18. It was clear that the managing broker did not have to accept any person who had passed their licensing examinations. Thus, Long & Foster clearly had discretion in selection and engagement, and this prong of the McDonald test has been met.

The second prong of the *McDonald* test, asks the Court to look at the compensation paid to Ebbets by Long & Foster. Ebbets was paid by commission, and received an IRS form 1099.[4] At first blush, the payment of commissions would seem to be a factor in favor of a finding of an independent contractor, rather than employment. Virginia Courts either do not put too much weight on this prong, or they do not consider the payment of commissions as that different from a wage or salary. In *Texas Company*, the driver/cosignee was paid on a commission basis yet found to be an employee. Moreover, the Virginia Supreme Court concluded that an employee could be paid in the form of commissions or a share of profits. *Unemployment Compensation Commission of Virginia v. Harvey*, 179 Va. 202, 215, 18 S.E.2d 390 (1942). Further, the physician in *McDonald* was paid in a lump monthly sum reported on a 1099 rather than a W-2. The Court, however, did not see this factor as precluding a factual determination that the doctor was an employee. Further, in *Clinchfield Coal Corp.*, 123 Va. 420, a malicious prosecution case, the worker was not even on the defendant's payroll. Rather, he was paid a salary by a third party (the detective agency). Nevertheless, the Court concluded that the worker was the defendant's employee because he "[L]ooked to the defendant, was subject to its orders and directions, and that his principal business was to carry out the wishes and purposes and policy of the defendant." *Clinchfield Coal*, 123 Va. at 433.

---

[4] The test for whether someone is an independent contractor for tax purposes, is a distinct test. The factors considered are completely different from the *McDonald* test.

In *Steffan*, the Court found persuasive the fact that the broker received the commission and then transmitted the commission to the salesperson, setting off any amount that the salesperson owes to the broker, and the fact that all suits for commission be brought in the name of the Broker. Thus, the commission that the salesperson earned was derivative of what the broker earned.

This is precisely what occurred in the instant case. Long & Foster paid Ebbets in commission. Ebbets Deposition p. 110-111. Ebbets was responsible for his own withholdings (tax, social security, unemployment). The commissions, however, were never paid directly to Ebbets from customers or from the settlement. Rather, all monies were given to Long & Foster, and then Long & Foster would directly deposit Ebbets' share of the commission into his account after deducting any moneys he had charged to his account, or agent account. Ebbets Deposition at p. 110-111; Nash Deposition p. 87 line 15-21. Ebbets was not allowed to accept a check written to him, nor was he allowed to accept cash. Nash Deposition p. 23 line 22 - p. 24 line 9. In addition, Long & Foster controlled the percentage amount that Ebbets could earn from the sale of real properties. Long & Foster set the percentage rates, and how much a salesperson needed to gross in sales to move between the percentage categories. See Residential Sales Commission Schedules. These rates were subject to change: the schedule in place in 2005 indicated that it superseded all previous schedules and was subject to change.

Thus, despite the form of compensation, the second prong of the McDonald test has been met: Long & Foster employed Ebbets. He was not an independent contractor controlling his own compensation.

The third prong of the McDonald test, the power of dismissal, is linked with the right to control. In *Griffith v. Electrolux Corp.*, 176 Va. 378, 11 S.E.2d 644 (1940) the Virginia Supreme Court concluded that a salesperson was an independent contractor when, along with other factors regarding control of the salespersons activities, there was no absolute power of dismissal In contrast, in *Barber, Admr. v. Textile Machine Works*, 178 Va. 435, 17 S.E.2d 359 (1941) the company had an absolute power of dismissal–it could shift the worker to the inactive list at any time or actually drop him from their rolls, which was actually done after the incident which gave rise to the litigation. Thus, coupled with the right to direct the worker's activities, the Virginia Supreme Court concluded that the worker was an employee rather than an independent contractor. The Power To Terminate a non-assignable personal services contract at will supports reasonable inference of power to control (whether actually exercised or potential) under Virginia law:

> **This power of discharge made obligatory any instructions given**, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out. * * *"

Texas Co., 177 Va. at 565, 14 S.E.2d at 707 (emphasis added) (1941) (Virginia Supreme Court).

Indeed, looked at in conjunction with the right to control, the power of dismissal is often deemed a hallmark of the employer-employee relationship. *See Virginia Employment Commission v. A.I.M. Corp.*, 225 Va. 338, 348-349, 302 S.E.2d 534 (1983); *Sinclair Refining Co. v. Unemployment Compensation Commission*, 189 Va. 692, 710 (1949) (finding the employer-employee relationship existed and noting that "His contract may be canceled with or without cause and without notice.") *Texas Company*, 177 Va. at 565 (citing power to discharge on five days notice as a factor for finding employment relationship).

Long & Foster clearly had power to fire Ebbets, or any of its salespersons. This was simply done by returning the salesperson's license to the Real Estate Board in Richmond. Nash deposition p. 29; Brouwer Deposition p. 46 line 16-47 line 4. The Policy Manual clearly anticipates scenarios in which a salesperson could be terminated. A salesperson can be subject to immediate termination for using a Long & Foster form for a real property sale in which Long & Foster was not involved. Policy Manual p. 32. In addition, if a salesperson's use of alcohol, prescription drugs, or over the counter medication impaired the salesperson's ability to work, or if there was any evidence of use of illegal drugs, Long & Foster could discharge the salesperson. Policy Manual p. 11. Mr. Nash further testified that on one occasion he had concerns regarding the driving ability of one his salespersons. He had observed her

hitting another car in the parking lot, and had learned that she had to call into the office for directions to the office. Mr. Nash spoke to her and told her not to drive clients in her car, and suggested that she retire. She left Long and Foster, but Mr. Nash testified that had she not turned in her license he would have terminated her license. Nash Deposition p. 107-108. Thus, it is clear that Long & Foster had to ability to terminate any of its salespersons. The third prong of the *McDonald* test, therefore, has been met. Long & Foster had the power to dismiss Ebbets at any point in time.

The third prong of the McDonald test, the power of dismissal, is linked with the right to control. In *Griffith v. Electrolux Corp.*, 176 Va. 378, 11 S.E.2d 644 (1940) the Virginia Supreme Court concluded that a salesperson was an independent contractor when, along with other factors regarding control of the salespersons activities, there was no absolute power of dismissal In contrast, in *Barber, Admr. v. Textile Machine Works*, 178 Va. 435, 17 S.E.2d 359 (1941) the company had an absolute power of dismissal–it could shift the worker to the inactive list at any time or actually drop him from their rolls, which was actually done after the incident which gave rise to the litigation. Thus, coupled with the right to direct the worker's activities, the Virginia Supreme Court concluded that the worker was an employee rather than an independent contractor.

Indeed, looked at in conjunction with the right to control, the power of dismissal is often deemed a hallmark of the employer-employee relationship.

See Virginia Employment Commission v. A.I.M. Corp., 225 Va. 338, 348-349, 302 S.E.2d 534 (1983); *Sinclair Refining Co. v. Unemployment Compensation Commission*, 189 Va. 692, 710 (1949) (finding the employer-employee relationship existed and noting that "His contract may be canceled with or without cause and without notice.") *Texas Company*, 177 Va. at 565 (citing power to discharge on five days notice as a factor for finding employment relationship).

Long & Foster clearly had power to fire Ebbets, or any of its salespersons. This was simply done by returning the salesperson's license to the Real Estate Board in Richmond. Nash deposition p. 29; Brouwer Deposition p. 46 line 16-47 line 4. The Policy Manual clearly anticipates scenarios in which a salesperson could be terminated. A salesperson can be subject to immediate termination for using a Long & Foster form for a real property sale in which Long & Foster was not involved. Policy Manual p. 32. In addition, if a salesperson's use of alcohol, prescription drugs, or over the counter medication impaired the salesperson's ability to work, or if there was any evidence of use of illegal drugs, Long & Foster could discharge the salesperson. Policy Manual p. 11. Mr. Nash further testified that on one occasion he had concerns regarding the driving ability of one his salespersons. He had observed her hitting another car in the parking lot, and had learned that she had to call into the office for directions to the office. Mr. Nash spoke to her and told her not to drive clients in her car, and suggested that she retire. She left Long and Foster, but Mr. Nash testified that had she not resigned, he would

have terminated her license and returned it into the state. Nash Deposition p. 107-108. Thus, it is clear that Long & Foster had to ability to terminate any of its salespersons. The third prong of the *McDonald* test, therefore, has been met. Long & Foster had the power to dismiss Ebbets at any point in time.

CONCLUSION

This Court ought to grant this Petition for a Writ of Certiarrai to define the bounds of summary judgment in a world where the common man is often denied his day in court and his day before a jury of peers as provided by the constitution in the interest of expediency. It is easy for a trial judge to substitute his or her judgment for that of a juror. All persons bring to their view of the world their disparate experiences and often we cannot reconcile how others have a different view, but that is to be protected when a jury rather than a judge decides issues which are subjective, which are subject to interpretation of facts, which are subject different view of the world as comes from the experience of different jurors. This Court should draw a line so it makes clear that though basic facts may not be in dispute, where they are subject to different interpretation, different conclusion and different inference, those cases are not appropriate for summary judgment and deserve the right to a jury trial. Most particularly the court should be cautious in the grant of summary judgment where the cause of action is a common law cause of action arising under state law.

Respectfully submitted,

Steven M. Garver, Esq.
Counsel of Record
Garver Law Offices, P.C.
P.O. Box 2430
Reston, Virginia 20190
703-471-1090
fax 703-471-1095
garver@garverlaw.com
Counsel for Petitioners

APPENDIX

[ENTERED: JANUARY 25, 2010]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff - Appellant,

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff,

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee,

and

CHARLES STEPHEN EBBETS,

Defendant.

No. 08-1663

MARCUS HESSE, Guardian Ad Litem
of Josef Hesse,

Plaintiff – Appellant,

and

HORST SCHWINN, Guardian Ad Litem
of Doerte Hesse,

Plaintiff,

v.

LONG & FOSTER REAL ESTATE,
INCORPORATED,

Defendant – Appellee,

and

CHARLES STEPHEN EBBETS,

Defendant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:07-cv-00603-LMB-TCB)

Argued: September 23, 2009
Decided: January 25, 2010

Before MOTZ, Circuit Judge, HAMILTON, Senior Circuit Judge, and Irene M. KEELEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Steven M. Garver, GARVER LAW OFFICES, PC, Reston, Virginia, for Appellants. Danielle D. Giroux, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee. **ON BRIEF:** Douglas K. Landau, ABRAMS LANDAU LTD, Herndon, Virginia; Roger T. Creager, THE CREAGER LAW FIRM, PLLC, Richmond, Virginia, for Appellant Horst Schwinn, Guardian Ad Litem of Doerte Hesse. Stanley P. Wellman, HARMAN, CLAYTOR, CORRIGAN & WELLMAN, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The dispute before us grows out of a tragic accident. At approximately 10:30 A.M. on July 23, 2005, while riding their motorcycle in Fauquier County, Virginia, Josef Hesse and his wife, Doerte ("the Hesses"), were struck by a Cadillac Deville sedan driven by a realtor named Charles Stephen Ebbets ("Ebbets"). The Hesses received catastrophic brain injuries as a result of the accident and are incapacitated. Their *guardians ad litem* sued Ebbets individually, and also sued Long & Foster Real Estate, Inc. ("Long & Foster") as Ebbets's employer

under a theory of respondeat superior. The district court entered judgment in favor of Long & Foster after concluding that Long & Foster was not vicariously liable for the Hesses' injuries because Ebbets was not acting as its employee at the time of the accident. Following this, the Hesses proceeded to trial against Ebbets and obtained a verdict for $36 million in damages. They now appeal to us, arguing that the district court erred when it entered summary judgment in Long & Foster's favor. We affirm.

I.

Sometime prior to 2005, Ebbets entered into a Broker-Associate Independent Contractor Agreement ("Agreement") with Long & Foster.[1] As part of this Agreement, the parties contemplated that Long & Foster would provide Ebbets with access to its facilities and listings, and also would assign him a supervising broker as required under Virginia law. The parties further agreed that, in exchange for these benefits, Ebbets, a very successful realtor, would use his best efforts to sell or lease real estate listed by Long & Foster. Throughout their relationship, each party was entitled to receive a percentage of any commissions received from real estate sales closed by Ebbets.

---

[1] The independent contractor agreement is not dated. In his deposition, Ebbets stated that he believed he entered into the agreement in 2000, but he was uncertain of this date.

II.

The question before us is whether, under Virginia law, Ebbets, who was returning from a property inspection to Long & Foster's offices in Warrenton, Virginia when the accident occurred, was an employee of Long & Foster or an independent contractor. The Hesses contend that, to resolve this question, we must consider the four factors of (1) selection and engagement, (2) payment of compensation, (3) power of dismissal, and (4) power to control the work of the individual articulated in McDonald v. Hampton Training Sch. for Nurses, 486 S.E.2d 299, 301 (Va. 1997). Of these, they assert the power to control is determinative, and that the provisions of Virginia law requiring brokers to supervise real estate salespersons impose a legal duty on brokers to control the realtors they supervise. See Va. Code Ann. § 54.1-2101 (2009); 18 Va. Admin. Code § 135-20-160(D) (2009). They also argue that the limitations and requirements imposed on Ebbets under the Agreement, and the circumstances of his relationship with Long & Foster, could allow a jury reasonably to infer that Long & Foster had the power to control the means and methods of his sales efforts and performance as a realtor.

Long & Foster disputes this, arguing that, both under Virginia law and the terms of the Agreement, Ebbets was an independent contractor. It contends the licensing regulations of the Virginia Real Estate Board that require all realtors to be supervised by a licensed real estate broker cannot

create a *de facto* master-servant relationship.[2] This is because § 54.1-2101 defines "real estate salesperson" in part, as a person "affiliated as an independent contractor with[] a real estate broker . . . ." According to Long & Foster, to hold that Virginia's Administrative Code imposes a duty on brokers to control the realtors they supervise would eviscerate the Virginia General Assembly's statutory expectation that a broker may supervise a realtor working as an independent contractor to the broker. Finally, Long & Foster points to terms in the Agreement that expressly forbade it from controlling the means and manner of Ebbets's work as a realtor, terms it honored throughout its relationship with Ebbets.

After considering these arguments in the parties' cross-motions for summary judgment, the district court granted summary judgment to Long & Foster. In a well-reasoned opinion that thoroughly analyzed applicable Virginia law, as well as the Agreement between Long & Foster and Ebbets, the district court concluded that Ebbets was acting as an independent contractor at the time of the accident. It therefore granted summary judgment on the basis that Long & Foster neither controlled nor had the power to control Ebbets's work as a realtor. Hesse v. Ebbets, 2007 WL 4562818 (E.D. Va. 2007).

---

[2] Virginia regulations require supervising brokers to "exercise reasonable and adequate supervision of the provision of real estate brokerage services by associate brokers and salespersons assigned to the branch office." 18 Va. Admin. Code § 135-20-160(D)

III.

We review a district court's entry of summary judgment *de novo*, drawing all inferences in the light most favorable to the non-moving party. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). After careful consideration of the record, the briefs and oral arguments, and the record before us, we affirm on the basis of the district court's well-reasoned opinion.

AFFIRMED

[ENTERED: JANUARY 25, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608(L)
(1:07-cv-00603-LMB-TCB)

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff – Appellant

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

No. 08-1663
(1:07-cv-00603-LMB-TCB)

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff – Appellant

and

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: MAY 1, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE,

and

HORST SCHWINN, Guardian of
DOERTE HESSE,

Plaintiffs,

v. No. 1:07cv603 (LMB)

CHARLES STEPHEN EBBETS, et al.,

Defendant.

ORDER

For the reasons stated in the Court's order of March 27, 2008, it is hereby

ORDERED that a judgment of $15 million ($15,000,000.00) be and is entered in favor of plaintiff Marcus Hesse, Guardian of Josef Hesse, against defendant Charles Stephen Ebbets, and it is further

ORDERED that a judgment of $21 million ($21,000,000.00) be and is entered in favor of

hwinn, Guardian of Doerte Hesse,
Charles Stephen Ebbets.

o Fed. R. Civ. P. 58, the Clerk is
r judgment in favor of plaintiffs
t Ebbets and to enter judgment in
nt Long and Foster. The Clerk is
to remove this matter from the
2008 and forward copies of this
of record.

is 1st day of May, 2008.

nia

/s/
ie M. Brinkema
ed States District Judge

BEST AVAILABLE COPY

[ENTERED: MAY 1, 2008]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE,

and

HORST SCHWINN, Guardian of
DOERTE HESSE

Plaintiffs

v. Civil Action No. 1: 07cv603

CHARLES STEPHEN EBBETS, et al.

Defendants

JUDGMENT

Pursuant to the order of this Court entered on May 1, 2008 and in accordance with Federal Rules of Civil Procedure 58:

JUDGMENT is hereby entered in favor of plaintiff, Marcus Hesse, Guardian of Josef Hesse, against defendant, Charles Stephen Ebbets, in the amount of $15 million dollars ($15,000,000.00).

JUDGMENT is hereby entered in favor of plaintiff, Horst Schwinn, Guardian of Doerte Hesse, against defendant Charles Stephen Ebbets, in the amount of $21 million dollars ($21,000,000.00).

JUDGMENT is hereby entered in favor of defendant, Long and Foster Real Estate, Inc.

FERNANDO GALINDO, CLERK

By: /s/
Deputy Clerk

May 1, 2008
Alexandria, Virginia

[ENTERED: DECEMBER 20, 2007]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MARCUS HESSE, Guardian of
JOSEF HESSE, et al.

Plaintiffs,

v. No. 1:07cv603 (LMB)

CHARLES STEPHEN EBBETS, et al.

Defendants.

MEMORANDUM OPINION

In this personal injury action, the plaintiffs seek to impose liability on the defendant Long and Foster Realty, Inc. ("Long and Foster"), for an automobile accident allegedly caused by the defendant Charles Stephen Ebbets. They contend that, at the time of the accident, Ebbets was acting as an employee of Long and Foster, rendering Long and Foster responsible under a theory of respondeat superior. The parties have filed cross motions for summary judgment on this issue. For the reasons stated in open court as amplified in this memorandum opinion, the Court has granted Long and Foster's motion for summary judgment and

denied the plaintiffs' motions for summary judgment.[1]

Background

The parties do not dispute that on July 23, 2005 at around 10:30 a.m. in Fauquier County, defendant Ebbets, a real estate salesman, was driving north on Route 688 in his Cadillac DeVille sedan. He had just visited one of his property listings and, after noticing that the "for sale" sign and information box were missing, decided to drive to Long and Foster's Warrenton office to collect replacements. While attempting to cross the intersection of Route 688 and Route 55, Ebbets's car hit a motorcycle, critically injuring the driver, Josef Hesse, and his wife, Doerte Hesse, who was riding as a passenger. At the time of the accident, Ebbets was a highly successful, long-time associate with Long and Foster, selling real estate under a "Broker-Associate Independent Contractor Agreement."

Both Josef Hesse and Doerte Hesse are presently incapacitated. Their guardians have brought this personal injury suit on their behalf.[2]

---

[1] This memorandum opinion addresses only the issue of respondeat superior. The plaintiffs also moved for summary judgment with respect to the liability of Ebbets. As explained in open court, the Court denied that motion, as there are material issues of fact in dispute.

[2] On September 14, 2007, Marcus Hesse and Horst Schwinn were appointed to act as guardians ad litem for Josef Hesse and Doerte Hesse, respectively.

Standard of Review

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a court should accept the evidence of the nonmovant, and all justifiable inferences must be drawn in his or her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The parties have stipulated that there are no issues of fact in dispute regarding Ebbets's contractual relationship with Long and Foster. Having thoroughly reviewed the parties' exhibits and deposition transcripts, the Court agrees with this characterization of the evidence. The only question is whether, in light of the undisputed evidence, Ebbets was acting as an employee or as an independent contractor of Long and Foster.

Discussion

To impose liability on Long and Foster, plaintiffs must show that Ebbets was functioning as an employee, and not as an independent contractor, when he engaged in his allegedly negligent conduct. Virginia looks to the following factors to distinguish an independent contractor from an employee: "(1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual." McDonald v. Hampton Training Sch. for Nurses, 486 S.E.2d 299,

301 (Va. 1997). Of the four factors, "the power to control" is determinative. Id.

Plaintiffs offer two arguments to support their position that Ebbets was a Long and Foster employee. First, they broadly contend that under Virginia law real estate salespersons are always "employees" of their real estate broker. Second, they argue that Ebbets was an employee based on the specific characteristics of his relationship with Long and Foster.

1. Virginia Law Governing Real Estate Salespersons

Under Virginia law, an individual or entity that sells, buys, or negotiates the purchase or sale of real estate is a "real estate broker." Va. Code. § 54.1-2100. A "real estate salesperson" has an identical function, except he must first affiliate with a broker before engaging in his profession. See § 54.1-2101. Both positions require licenses from the Virginia Real Estate Board. See § 54.1-2106.1(B), (C).

Various regulatory obligations inure to each party once a broker-salesperson relationship is consummated. To avoid a conflict of interest, the salesperson must not accept compensation from any broker other than his principal broker, nor act as an agent for a client outside his broker's firm. See 18 Va. Admin. Code §§ 135-20-270, 135-20-280(2). The salesperson must also identify the name of the licensed broker with whom he is associated on all advertisements. §§ 135-20-190, 135-20-290(4).

In turn, the licensed broker must "exercise reasonable and adequate supervision of the provision of real estate brokerage services by ... salespersons." § 135-20-160(D). The broker must also provide guidance on the handing of escrow deposits, compliance with state and federal laws, negotiation and drafting of contracts, mandatory disclosures of the conditions of property, and advertising. Id. Finally, Virginia has adopted extensive regulations concerning escrow accounts and financial records. The broker must maintain, and the salesperson must utilize, escrow accounts for deposits and down payments in real estate transactions. § 135-20-180. The broker must also possess a complete record of financial transactions conducted by his firm. § 135-20-185.

Plaintiffs repeatedly invoke these statutory provisions to show Long and Foster's authority to control Ebbets. Specifically, plaintiffs argue that because Virginia law vests a broker with these legal responsibilities for its salespersons, its salespersons are a fortiori employees of their broker.

Plaintiffs' argument fails to address the statutory definition of "real estate salesperson," which explicitly includes "independent contractor":

> [A]ny person, or business entity of not more than two persons . . . who for compensation or valuable consideration is employed either directly or indirectly by, or affiliated as an independent contractor with, a real estate broker, to sell or offer to sell, or to buy or offer to

> buy, or to negotiate the purchase, sale or exchange of real estate, or to lease, rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon.

Va. Code § 54.1-2101 (emphasis added). The Virginia Real Estate Board employs this distinction in its regulations as well. See, e.g., 18 Va. Admin. Code § 135-20-10. Given the clear meaning of the term "independent contractor" in modern legal parlance, the Court must presume that the use of the term in the statute demonstrates the Virginia General Assembly's endorsement of the employee/independent-contractor distinction in the real estate profession. Acceptance of plaintiffs' position would read the phrase "affiliated as an independent contractor" out of the statute.

Second, plaintiffs conflate the duty of supervision with the power to control. Although Long and Foster had a general duty to ensure that its salespersons complied with statutory and administrative regulations under the Virginia statutory scheme, these statutory requirements and administrative regulations do not implicate "the means and method of performing the work." McDonald, 486 S.E.2d at 301. They do not dictate the nature of the salesperson's relationship with his broker, only that he may associate with one broker. They do not control the specific content of a salesperson's advertising other than requiring that the salesperson identify his affiliated broker. They do not fix the percentage of the commission,

regulating only how it is to be transmitted after the contract is finalized.

Contrary to plaintiffs' suggestion, the Virginia statutory scheme does not create a de facto master-servant relationship between a real estate broker and a salesperson. Instead, these regulations set out broad boundaries within which salespersons may operate and place the onus on the brokers to ensure compliance. They do not, however, implicate the time, place, and manner in which a salesperson may solicit buyers, negotiate a deal, or execute an agreement. Whether a particular salesperson is an employee of a broker or affiliated as an independent contractor turns on the unique circumstances of the salesperson's relationship with his broker.

2. Ebbets's Written Contract With Long and Foster

The Virginia Supreme Court has offered the following guidance on the "power to control" inquiry:

> [T]he rule of respondeat superior rests on the power of control and direction, which must be as proprietor, in the sense of stopping the work or of continuing it, and determining the way it shall be done, with reference to the method of reaching the result, and not merely the result to be reached ....

Coker v. Gunter, 63 S.E.2d 15, 16 (Va. 1951); see also Norfolk & W. Railroad Co. v. Johnson, 154 S.E.2d 134, 136 (Va. 1967) ("[T]he crucial question is

whether the Railroad had the right to control not merely results but the progress and details of the work."). The employing party need not have actually exercised this control, so long as it retained the discretion to do so. See McDonald, 486 S.E.2d at 301.

To ascertain the relationship between Long and Foster and Ebbets, the Court must "examine the written contract between the parties and the evidence concerning performance under that contract." Richmond Newspapers, Inc. v. Gill, 294 S.E.2d 840, 843 (Va. 1982). When these sources are considered, the Court easily concludes that Ebbets was acting as an independent contractor on the day in question.

The title of the contract, "Broker-Associate Independent Contractor Agreement," clearly demonstrates that the intent of the parties was to establish an independent contractor rather than an employer/employee relationship.

Furthermore, Clause Five of the independent contractor agreement sets forth the limited extent of Long and Foster's control over how Ebbets was to perform his work:

> CERTAIN RESPONSIBILITIES. Associate agrees to work diligently and with his/her best efforts to sell, lease or rent any and all real estate listed with Broker in jurisdictions where Associate is licensed, to solicit additional listings, clients and customers for said Broker, and otherwise to serve the public in real

> estate transactions and to promote the mutual benefit of the parties. . . . Associate shall not, however, be required to maintain any fixed schedule or minimum number of hours of work; while Associate shall not be required to attend any sales training or similar meetings, Associate is encouraged to do so in order for Associate to maintain his/her professional competency.

The import of the provision is clear. Long and Foster had no authority to control Ebbets' schedule, to insist that he carry a minimum workload, or to command his presence at company meetings Rather, it could only demand his best efforts to solicit listings, clients, and contracts - i.e., the end product. This hands-off association is the sine qua non of an independent contractor relationship.

When pressed to explain this language at oral argument, counsel for plaintiff Josef Hesse repeatedly insisted that Long and Foster could alter its Policy Manual at a whim and demand Ebbets' participation at meetings, insist on his presence at the office, and mandate that he perform minimum monthly hours or sales.[3] This position ignores Clause Eighteen of Ebbets's contract, which explicitly identifies the contract, not the Policy Manual, as the document governing Ebbets's obligation and states that any conflict between the contract and the Policy

---

[3] The Policy Manual's provisions, which are binding on salespersons, are "subject to change in the overall best interests of Long & Foster."

Manual shall be resolved in favor of the contract.[4] An attempt by Long and Foster to mandate that Ebbets accept a fixed work schedule would violate the clear language of Clause Five.

Finally, the contract contains broad indemnification provisions in Clauses Nine and Thirteen. In a traditional master-servant relationship, the master indemnifies the servant for any action taken on his behalf. See Restatement (Second) Torts § 886B(2)(b). Put succinctly, the master accepts liability in exchange for his power to control. However, Long and Foster's relationship with Ebbets presents the opposite scenario. Under his contract, Ebbets agreed to indemnify Long and Foster for his conduct as a salesperson, explicitly including any liability arising out of Ebbets' operation of his vehicle.

A plain reading of these indemnification provisions with Clause Five shows that Long and Foster expressly disclaimed any power to control the means and manner in which Ebbets sold real estate and that Ebbets expressly granted broad indemnification to Long and Foster for the means and manner of his real estate sales. The Court finds this circumstance to be strongly, if not conclusively, indicative of an independent contractor relationship.

---

[4] Clause Eighteen provides: "In the event there is any such conflict between said Long & Foster Real Estate, Inc., Policy Manual, written Company memoranda and this Agreement, then this Agreement shall control but only to the extent of any such conflict."

3. Long and Foster's Policies and Practices

The Court's conclusion is confirmed by an examination of Long and Foster's policies and practices with respect to its salespersons, or "associates," at the time of the accident. Each associate set his own hours. Long and Foster did not require an associate's presence in the office, nor did it keep track of when he was in the office. Brouwer Dep. 44; Ebbets Dep. 56. Also, Long and Foster did not keep track of its associates' appointments schedules. Brouwer Dep. 81-82. The managing broker would conduct periodic informal reviews with his associates, but did not get involved in their day-to-day activities. Brouwer Dep. 108, 115.

Long and Foster did not have rules or guidelines about the display of properties or the solicitation of new customers. Each individual associate could decide how to advertise properties and how to solicit clients. Brouwer Dep. 19. Unless pre-approval was secured from the managing broker, the associate was financially responsible for any work or improvements ordered on a property listing. PM 30.

Associates generated their own listings. Nash Dep. 13. The seller and associate would negotiate the listing contracts. Only at a later point in the process would the managing broker review the contract and sign it. Nash Dep. 18-19.

Long and Foster did not issue work assignments to its associates. Although some associates performed "desk duty," which involved

handling general phone inquiries to the office, the desk duty was voluntary. Nash Dep. 127. Long and Foster did not restrict its associates to particular territories to avoid competition. Brouwer Dep. 16; PM 28.

Long and Foster provided boilerplate forms drafted by the Northern Virginia Association of Relators in accordance with state and federal laws. Brouwer Dep. 23-24, Nash Dep. 120-21. Although associates were encouraged and/or instructed to use those forms to ensure compliance and efficiency, they could insert special modifications or contingencies when necessary. Brouwer Dep. 132-33; Nash Dep. 22-23, 121. Long and Foster would review all contracts to ensure that the required information was present. Brouwer Dep. 23; Nash Dep. 20.

Although Long and Foster provided associates with "for sale" signs, which displayed the associate's name and "Long and Foster," the associates bore the sole responsibility of maintaining these signs and any brochure boxes placed on their properties. Brouwer Dep. 77-78. Associates were free to contract with third parties to perform these services. Brouwer Dep. 80; Ebbets Dep. 125-26. The decision to use a lock box was left to the associate, who was responsible for purchasing or leasing it. Brouwer Dep. 91; PM 30.

An associate could take out individual advertisements in local newspapers and magazines, so long as he identified his affiliation with Long and Foster as his licensed broker. Brouwer Dep. 110,

112. Long and Foster retained the right to review this advertising. PM 29.

Associates used their own vehicles to conduct business. Ebbets Dep. 100. Company policy (and the associate's contract) required that an associate keep a minimum liability policy of $250,000 per person, $500,000 per accident. PM 9.

Although Long and Foster established minimum commissions for real estate transactions, PM 39, in practice, managers allowed associates to negotiate their own commission rates for each listing. Brouwer Dep. 22; Nash Dep. 75; Ebbets Dep. 113. Long and Foster then took a percentage of that commission as set out in the Commission Schedule. It did not award any other compensation or bonuses, Nash Dep. 37.

Under Ebbets' contract, either party could terminate the relationship at any time by written notice. If Ebbets's affiliation with Long and Foster ended, his license would be returned to the Virginia Real Estate Board, which could then reassign it to another licensed broker. Nash Dep. 29. His sales contracts would remain with Long and Foster, but he would receive his full commission. Nash Dep. 38.

Each associate could maintain an expense account with Long and Foster for advertising, expenses, and errors and omissions insurance. Brouwer Dep. 95. However, he could also purchase these items directly. Id. If expenses were billed to the expense account, Long and Foster would deduct

the amount from the associate's commission.[5] Nash Dep. 110.

As a matter of state law, associates were required to attend continuing education courses. Although Long and Foster made such courses available, it did not mandate them. An associate could register for any company's course, so long as it was state approved. Nash Dep. 41. Also, Long and Foster charged a fee to its associates to attend its seminars. Nash Dep. 42. It did not keep track of its associates' hours. Brouwer Dep. 40-41.

Long and Foster offered associates the ability to use its internet site and a company email address, however, associates were permitted to use third party websites instead, and many did. Brouwer Dep. 31.

Although Long and Foster retained some control over the working conditions of its associates, much of which was mandated by state law, its associates retained substantial authority to conduct their sales activities - to choose their work hours, to select their clients, to generate their listings, to display their properties, to advertise their services, and to close deals.[6] Long and Foster reviewed their

---

[5] Long and Foster did reimburse its associates for certain expenses - postage, long distance telephone calls, tuition for license, and customer gifts under $5. See Policy Manual 46.

[6] Of particular note, "associates are free to farm any area they wish." PM 28. If it had the "power to control" its associates' affairs, as plaintiffs contend, one would expect a more centralized effort by Long and Foster to coordinate its associates' efforts.

contracts to ensure compliance with state law and company policies, but it had almost no involvement in the day-to-day work of its salespersons.

Plaintiffs' repeated hypotheticals about how Long and Foster might revise its policies in the future to demand greater control over its salespersons are unhelpful. Although the Long and Foster policy manual was subject to revision at any time, the Court must examine the policies and practices in existence at the time of the accident. See Coker, 63 S.E.2d at 16 ("The answer, as we shall see, is to be found by ascertaining which one had the power of control over Minggia at the time of the accident.") (emphasis added).

Plaintiffs' other citations to Long and Foster policies in effect at the time of the accident are not persuasive. Those policies are, at best, tangential to the work of a salesperson or are taken out of context. For example, plaintiffs repeatedly highlight company policies that prohibited associates from conducting real estate business for another broker and required them to identify "Long and Foster" in advertisements. As discussed above, Virginia law requires salespersons to affiliate with a licensed broker when conducting their affairs and identify that affiliation. These Long and Foster policies simply define who Ebbets can work for, but say nothing about the time, place, and manner in which he conducts his business. With respect to the advertising policies, there is no evidence in the record to show that Long and Foster ever exercised any control beyond ensuring that its name and logo were properly displayed.

Plaintiffs also argue that Long and Foster required its associates to carry errors and omissions insurance and auto insurance, to dress appropriately, and to not use alcohol or drugs in the work place. The Court does not find that these policies materially constrain the manner in which an agent conducts his business other than to impose minimum standards of conduct that are generally accepted in any professional environment, not unique to the real estate field.[7]

Plaintiffs also emphasize that salespersons were expected or instructed to use stock forms when drafting their listing and sales contracts. Again, plaintiffs fail to explain how, through these forms, Long and Foster controlled its associates' activities. The forms provided boilerplate language, designed to ensure that the contract complied with applicable laws and contained all the essential terms of a contract. It is undisputed that agents retained authority to insert modifications or contingencies. See Nash Dep. 121.

Finally, at oral argument and in his brief, counsel for Doerte Hesse recited a long list of Long and Foster policies relating to its salespersons' use of the company-provided office, phones, copiers, computers, etc., which require, for example, the

---

[7] In a similar vein, plaintiffs highlight Long and Foster's policy of preventing telephone solicitations before 8 a.m. or after 9 p.m., prohibiting the use of automatic dialing systems, and requiring each office to maintain a "Do Not Call" list. See PM 16. These policies were enacted to comply with the basic requirements of the Telephone Consumer Protection Act, see 47 U.S.C. § 227, and do not materially constrain the work of a salesperson.

salesperson to document his presence after normal business hours, turn off the lights upon leaving the office, accurately transfer phone calls, avoid parking in spots frequented by customers, and limit personal phone calls. Counsel also emphasized Long and Foster's right to monitor associates' emails and internet activity when using their <longandfoster.com> accounts.

These policies do not advance the plaintiffs' position because Long and Foster did not require associates to use the services and tools to which they applied. In other words, use of Long and Foster's office, computer, and phones was optional. If an associate chose to use the computer, he had to follow the rules. That Long and Foster retained the power to control these services does not mean that it also retained the power to control the associate.

The "power to control" inquiry looks not at the product of the salesperson's work, but whether the company controlled the manner of the work. When the record is viewed in its entirety, it is abundantly clear that "the time, means and method of doing [the work] were under [the] exclusive control" of the agents. Coker, 63 S.E. 2d at 755. For these reasons, the Court has concluded that at the time of this very tragic accident, Ebbets was not acting as an employee of Long and Foster and, therefore, Long and Foster has no liability for his conduct.

Request for Interlocutory Appeal

Plaintiffs have orally requested that the Court certify its summary judgment ruling for

interlocutory appeal. Long and Foster has filed a motion opposing that request. The Court will deny plaintiffs' request because resolution of the question of respondeat superior is not "a controlling question of law" whose resolution would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(c). Ebbets contests liability and the amount of damages, and the outcome of either could moot the need for an appeal. Furthermore, the Court sees no basis for finding a "substantial ground for a difference of opinion" on the legal principles discussed in this opinion.[8] Id.

Outstanding Discovery and Trial Issues

The Court is well aware of the difficulties incurred by all parties in fixing the magnitude of plaintiffs' injuries. Plaintiffs, who are significantly impaired, are presently in Germany and under the care of German doctors. Many of their medical records are in German. These circumstances will require the remaining parties to expend significant time and money in arranging for foreign depositions and in locating medical experts who can faithfully translate plaintiffs' records.

The Court also recognizes the need for prompt adjudication of the liability issue. Nearly two and one-half years have passed since the accident, and

---

[8] For similar reasons, the Court exercises its discretion and refuses to direct entry of final judgment under Fed. R. Civ. P. 54(b) as to Long and Foster. See Cantor v. Cohen, 442 F.3d 196, 198 (4th Cir. 2006) (emphasizing the district court's discretion in issuing certifications under Rule 54(b))

both parties are relying on live testimony to advance their theories of the case.

For these reasons, the Court will, in its discretion, bifurcate the proceedings. All discovery on damages will cease. Instead, the Court will set a prompt jury trial on the issue of liability. If the jury finds in favor of the plaintiffs, the Court will allow a brief period for settlement efforts. If the parties are unable to settle, discovery on the damages issue will be reopened, and a trial solely on the issue of damages will then be scheduled.

A separate order consisted with this opinion will be entered.

Entered this 20th day of December, 2007.

/s/
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

[ENTERED: FEBRUARY 22, 2010]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1608(L)
(1:07-cv-00603-LMB-TCB)

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff – Appellant

and

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

No. 08-1663
(1:07-cv-00603-LMB-TCB)

MARCUS HESSE, Guardian Ad Litem of Josef Hesse,

Plaintiff – Appellant

and

HORST SCHWINN, Guardian Ad Litem of Doerte Hesse,

Plaintiff

v.

LONG & FOSTER REAL ESTATE, INCORPORATED,

Defendant – Appellee

and

CHARLES STEPHEN EBBETS,

Defendant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Senior Judge Hamilton and Judge Keeley.

For the Court

/s/ Patricia S. Connor, Clerk